ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	
Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them	)	PR Docket No. 92-235
	)	
	)	

To: The Commission

COMMENTS OF BELLSOUTH

BELLSOUTH CORPORATION
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BELLSOUTH ENTERPRISES, INC.
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EXECUTIVE SUMMARY

I.

The Commission's *NPRM* proposes to codify in Part 88 rules that would prohibit wireline telephone companies from holding controlling interests in SMR licensees. The *NPRM* does not discuss any reasons for proposing rules that would render wireline carriers ineligible for SMR licenses, as the APA requires.

The Commission has acknowledged that the original reasons for these rules are no longer valid. It cannot readopt the rules with a new rationale without giving notice of its rationale and considering comments on it. The *Termination Order* in PR Docket 86-3 provides the Commission's only stated rationale for such rules, but it was arrived at without notice or consideration of comments. In any event, the rationale set forth in the *Termination Order* -- that changes in the SMR industry warrant preserving private land mobile service providers as a competitive alternative to cellular carriers -- does not support adoption of the proposed wireline SMR ineligibility rules.

The wireline SMR ineligibility rules proposed in the *NPRM* would also unconstitutionally deny equal protection to telephone companies without any rational basis. For no stated reason, telephone companies are singled out for ineligibility, while all other common carriers are eligible for SMR licenses.

Moreover, the termination of PR Docket 86-3 without consideration of the comments was improper, under a D.C. Circuit decision involving very similar facts, *Williams Gas Pipeline v. FERC.*

II.

The Commission's proposed private land mobile interconnection rules must be consistent with the Communications Act and must not regulate similarly situated licensees differently without a rational basis. The interconnection rules result in asymmetric regulation of competitors because they eliminate any meaningful, functional distinction between service providers that are subject to different regulatory schemes. The rules allow an SMR to offer interconnected service on a non-common-carrier basis, as long as the interconnection itself is not discretely provided "for profit." The Commission's rules thus allow SMRs and cellular carriers to provide virtually identical service. However, the cellular carrier is subject to nondiscrimination requirements, tariff filings, complaint proceedings, and other state and federal regulation, while the SMR is exempt from such regulation.

BellSouth advocates that the Commission adopt interconnection rules that conform to Section 332 of the Communications Act, establishing interconnection with the public switched network as the functional dividing line between private and common carriers. This would avoid regulatory asymmetry.

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BellSouth Corporation, BellSouth Telecommunications, Inc., BellSouth Enterprises, Inc., and BellSouth Cellular Corp. (collectively, "BellSouth"), by their attorneys, hereby submit these Comments in response to the Commission's *Notice of Proposed Rulemaking* in PR Docket 92-235, 7 FCC Rcd. 8105

Specifically, the Commission proposes to recodify the current rules,[1] with modifications, in proposed Rule Section 88.17,[2] and to extend the wireline SMR eligibility restriction by adopting proposed Rule Section 88.1005, to cover the new "innovative shared use" ("ISU") SMR systems.[3]

The term "wire line telephone common carriers" has been interpreted by the Commission to mean only those companies "providing landline local exchange telephone service."[4] Thus, the rules disqualify BellSouth Telecommunications, Inc. ("BST"), a provider of landline local exchange telephone service, from holding SMR licenses.

Moreover, the Commission staff has taken the informal position that the ineligibility rules may apply to telephone companies' subsidiaries, affiliates, and sister companies.[5] Accordingly, parties have cautiously assumed that the rules may be applied to related companies as well as telephone companies

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[1] 47 C.F.R. § 90.603(c) excludes "wire line telephone common carriers" from eligibility to hold SMR licenses in the 806-824, 851-869, 896-901, and 935-940 MHz bands, while a parallel rule, 47 C.F.R. § 90.703(c), excludes them from eligibility to hold SMR licenses for the 220-222 MHz band.

[2] Proposed Rule Section 88.17(a) provides, in relevant part:

> (a) *Eligibility.* Any entity proposing to provide station and ancillary facilities on a commercial basis may apply for a license as a Specialized Mobile Radio System (SMRS), *except:*
>
> . . .
>
> (2) In the 220-222 MHz, 806-821/851-866 and 896-901/935-940 MHz bands, wire line telephone common carriers are restricted to a non-controlling interest in any SMRS.

NPRM, Appendix D, 7 FCC Rcd. at 8162.

[3] Proposed Rule Section 88.1005 excludes "wire line telephone common carrier[s]" from eligibility "for an innovative shared use radio operations license" and provides that such licenses "will be granted as licenses in the Specialized Mobile Radio Service." *NPRM*, Appendix D, 7 FCC Rcd. at 8359. The rule extending wireline ineligibility to ISU systems utilizes the language of the current rule instead of incorporating the "non-controlling interest" language, for no apparent reason. *Compare* proposed Rule Section 88.1005 *with* proposed Rule Section 88.17.

[4] *SMR Eligibility*, PR Docket 86-3, *Order*, 7 FCC Rcd. 4398, 4398 n.2 (1992) (*Termination Order*), *pets. for recon. pending*; *pet. for review pending sub nom. BellSouth Corp. v. FCC*, No. 92-1334 (D.C. Cir.). Judicial review has been held in abeyance pending disposition of the petitions for reconsideration filed by Southwestern Bell and Bell Atlantic.

[5] *See, e.g.*, letter from Richard T. Shiben, Chief, Land Mobile and Microwave Division, to F. Thomas Moran, Esquire, dated February 9, 1988 (granting conditional wireline SMR ineligibility waiver on the basis that the SMR "systems will not themselves be operated by a wireline common carrier").

themselves. Thus, the business opportunities available to BellSouth companies other than BST are affected.

For example, BellSouth has been significantly hampered in its ability to further the development of the innovative mobile data service offerings of RAM Mobile Data USA Limited Partnership, an SMR licensee in which BellSouth holds a limited partnership interest.[6] BellSouth has also been limited in pursuing a wide variety of telecommunications ventures involving new services offered on an SMR basis, such as enhanced SMR service.

In addition, BellSouth is adversely affected by the current Part 90 and proposed Part 88 private land mobile interconnection rules. These rules allow SMRs to provide fully interconnected mobile telephone service functionally equivalent to the common carrier service provided by BellSouth, but without the various forms of state and federal common carrier regulation that apply to BellSouth's land mobile operations.[7]

B. The SMR Wireline Ineligibility Rules Are Subject to Comment and Review

The proposed rules are contained in an appendix to the *NPRM*, but the main text of the *NPRM* does not mention wireline ineligibility. The description of "major proposals" accompanying the *NPRM* also does not discuss the proposed rules or their basis. However, the "major proposals" paper suggests that the Commission may not consider comments on wireline eligibility until a subsequent proceeding:

> We leave the issue of whether wireline telephone common carriers should be eligible for innovative shared use licenses to a future proceeding covering wireline eligibility in all

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[6] RAM Mobile Data, Inc. obtained a declaratory ruling from the Private Radio Bureau before BellSouth Enterprises, Inc. ("BSE") invested in its SMR mobile data network. BSE is not a telephone company; it is a sister company to BellSouth's landline local exchange telephone service subsidiary, BellSouth Telecommunications, Inc. Without ruling that BSE was in fact subject to the wireline ineligibility rules, the staff held that the venture "will comply with Section 90.603(c) . . . , provided it is implemented in a manner that BSE will not be in *de jure* or *de facto* control of the SMR licensees." *See* Letter from Chief, Private Radio Bureau, to Henry Goldberg and Jonathan Wiener, dated July 1, 1991.

[7] For example, NexTel (formerly Fleet Call, Inc.), an enhanced SMR operator, has announced it will begin operation this summer in Los Angeles. This system will directly compete with the cellular systems in Los Angeles and the surrounding area. BellSouth has a 50 percent voting interest in the Los Angeles Block A cellular system.

> bands, including the 220-222 MHz, 851-866 MHz and 935-940 MHz bands. We seek comment on more flexible eligibility requirements that would open access to any *bona fide* applicant who can demonstrate financial qualifications and the ability to operate the system.[8/]

The rules proposed in Appendix D to the *NPRM*, however, would specifically make wireline carriers ineligible for SMR licenses and must be subject to comment.

The Commission has previously held that proposed rules contained in the appendix to an NPRM but not discussed textually are subject to comment and adoption.[9/] Thus, by proposing rules for adoption in this proceeding, the Commission has not "left the issue" to be decided in a future proceeding.

Any rules adopted in this proceeding will have immediate effects: wireline carriers would be excluded from all existing SMR bands, as well as from the new ISU SMR service. Therefore, comments on these rules must be considered.[10/] If the Commission adopts the wireline SMR ineligibility rules as

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8/ *NPRM*, Appendix A, 7 FCC Rcd. at 8121.

9/ In establishing rules for 220 MHz private land mobile radio systems, the Commission adopted a wireline ineligibility rule that had been proposed in the Appendix to its *NPRM* but not discussed in text. *220-222 MHz Private Land Mobile Services*, PR Docket 89-522, *Report and Order*, 6 FCC Rcd. 2356 (1991), *recon. denied*, 7 FCC Rcd. 4484 (1992). It rejected a petition for reconsideration claiming that the Commission had invalidly promulgated the rule due to lack of notice:

> The full text of Section 90.703(c) was . . . set forth in the Appendix to the *Notice*. . . . This was adequate to apprise interested parties of the fact that the restriction was being contemplated which . . . is all that Section 553(b) of the Administrative Procedure Act requires. . . . The full text of the wireline limitation was also set forth in the Appendix to the *Report and Order*. . . . This satisfied 5 U.S.C. § 553(c) . . . .

7 FCC Rcd. at 4487.

10/ Before adopting rules, the Commission is compelled to consider the comments and take them into account in drafting its statement of the rules' basis and purpose, as required by Section 553(c) of the Administrative

proposed, it must consider comments opposing them and provide a sufficiently reasoned explanation to permit meaningful judicial review.[11/]

DISCUSSION

I. THERE IS NO LAWFUL BASIS FOR ADOPTING THE PROPOSED WIRELINE SMR INELIGIBILITY RULES

Without conducting notice and comment rulemaking procedures, the Commission has for almost twenty years prohibited wireline telephone common carriers from holding SMR licenses, and it proposes to continue that policy here for the foreseeable future:

- The Commission adopted the rules in 1974,[12/] but did not explain its reasons for adopting the rules until eighteen years later.[13/]
- The Commission started a proceeding to eliminate the rules in 1986,[14/] but it did not act for six years, and the proceeding was then terminated with the rules left standing.[15/] There, the Commission
  - neither considered the comments nor sought further comments;
  - conceded that the original reasons for the rules had no continuing force;
  - left the rules standing based on a wholly new rationale, which had no connection to the rules, without notice and comment;
  - said it planned further evaluation of the rules, but it has not initiated any further proceedings nearly a year later;
- The Commission has not promptly disposed of the pending petitions for reconsideration while judicial review has been held in abeyance.

While the 1986 rulemaking was pending, the Commission in rapid succession conducted other SMR rulemakings, but wireline carriers remained excluded:

11/ *Camp v. Pitts*, 411 U.S. at 143; *see Public Citizen v. NRC*, 901 F.2d 147, 150-52 (D.C. Cir. 1990); *Eagle-Picher Industries, Inc. v. EPA*, 759 F.2d 905, 912-15 (D.C. Cir. 1985); *Investment Co. Institute v. Board of Governors of Federal Reserve System*, 551 F.2d 1270, 280-81 (D.C. Cir. 1977); *Geller v. FCC*, 610 F.2d 973, 977-80 (D.C. Cir. 1979).

12/ *Land Mobile Radio Service*, Docket 18262, *Second Report and Order*, 46 FCC 2d 752, 763-64 (1974), *recon. on other grounds, Memorandum Opinion and Order*, 51 FCC 2d 945 (1975), *aff'd sub nom. NARUC v. FCC*, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976).

13/ *Termination Order*, 7 FCC Rcd. 4398.

14/ *SMR Eligibility*, PR Docket 86-3, *Notice of Proposed Rulemaking*, 51 Fed. Reg. 2910 (Jan. 22, 1986).

15/ *Termination Order*, 7 FCC Rcd. 4398.

- Authorization of 900 MHz SMR systems.[16]
- Reallotment of many 800 MHz frequencies for SMR use.[17]
- Authorization of service to individuals by SMRs.[18]
- Authorization of "Enhanced SMR" systems comparable to cellular in scope• and capacity.[19]
- Authorization of 220 MHz SMR systems, subject to a new rule prohibiting wireline eligibility, while summarily rejecting the claim that there was no basis for the rule.[20]
- Adoption of short-spacing rules to allow SMRs to provide better coverage.[21]
- Elimination of end user SMR licenses.[22]

Similar expansion of the SMR industry's opportunities continue today.[23]

For the reasons which follow, the Commission cannot continue the wireline SMR ownership ban.

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[16] *900 MHz Reserve Band*, Gen. Dockets 84-1231, 84-1233, 84-1234, *Report and Order*, 2 FCC Rcd. 1825, 1829-1836 (1986), *recon. denied*, 2 FCC Rcd. 2515, *further recon. denied*, 2 FCC Rcd. 6830 (1987).

[17] *Subparts M and S*, PR Docket 86-404, *Report and Order*, 3 FCC Rcd. 1838 (1988), *recon. denied*, 4 FCC Rcd. 356 (1989).

[18] *Id.*

[19] *Fleet Call, Inc.*, 6 FCC Rcd. 1533 (1991).

[20] *220-222 MHz Private Land Mobile Services*, PR Docket 89-552, *Report and Order*, 6 FCC Rcd. 2356 (1991), *recon. denied*, 7 FCC Rcd. 4484 (1992).

[21] *SMR Co-Channel Short Spacing*, PR Docket 90-34, *Report and Order*, 6 FCC Rcd. 4929 (1991).

[22] *Elimination of SMR End User Licensing*, PR Docket 92-79, *Report and Order*, 7 FCC Rcd. 5558 (1992).

[23] The Commission proposes in this proceeding to expand the scope of SMR operations within existing bands and create a new band of "innovative shared use" SMR frequencies from which wireline carriers would be excluded. The Commission has also recently proposed authorization of 800 MHz wide-area service providers, with eligibility restricted to those currently holding SMR licenses, which rules out wireline carriers. News Release, Action in Docket Case, *Commission Puts Forth Proposals to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, PR Docket 93-144, mimeo 33140 (May 13, 1993).

A. Neither the NPRM nor the *Termination Order* Supports Adoption of the Rules in this Proceeding

The main text of the *NPRM* does not mention wireline ineligibility for SMR licenses. Nevertheless, rules effecting such a prohibition are proposed in Appendix D. The description of "major proposals" accompanying the *NPRM* also does not discuss the proposed rules or their basis. Thus, the Commission did not provide any statement of its reasons for proposing the wireline SMR ineligibility rules "sufficient . . . to permit interested parties to comment meaningfully."[24/] The absence of any notice of the Commission's rationale for its proposed rules contravenes the APA.[25/] This infirmity subjects the proposed rules, if adopted, to being vacated.

The wireline SMR ineligibility rules were adopted in 1974 without any statement of reasons.[26/] In 1986, the Commission initiated PR Docket 86-3 to eliminate the rules, stating that the rules had become "unnecessary," and that eliminating the rules would benefit the public by increasing competition.[27/]

Six years later, the Commission decided to terminate that proceeding.[28/] In the *Termination Order* closing that docket, the Commission found that "the origin of the wireline limitation was not explicitly discussed in either Docket No. 18262 or any subsequent proceeding."[29/] The Commission therefore reconstructed the "likely bases" for the rules,[30/] but it found that these "original" reasons no

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24/ *Florida Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1045 (1989).

25/ 5 U.S.C. § 553(b).

26/ *See* note 12, *supra*.

27/ *SMR Eligibility*, PR Docket 86-3, *Notice of Proposed Rulemaking*, 51 Fed. Reg. 2910, 2911 (Jan. 22, 1986).

28/ *Termination Order*, 7 FCC Rcd. 4398.

29/ *Termination Order*, 7 FCC Rcd. at 4398.

30/ The *Termination Order* hypothesized three reasons for the adoption of the wireline SMR ineligibility rules:

(continued...)

longer had any continuing validity.[31] However, it retained the rules, stating the following rationale for its action:

> [A]t present, we are persuaded that the wireline limitation serves a useful purpose. Recent trends in the SMR service reflect that private carrier land mobile providers have begun to emerge as innovative and viable competitors to common carrier land mobile offerings. By retaining the wireline restriction at least until we have had an opportunity to evaluate fully the competitive potential of private land mobile services vis-a-vis common carrier land mobile providers, we will be able to preserve a climate favorable to the continued development of private land mobile competitors. For these reasons, we conclude that the public interest will be best served by the termination of this proceeding.[32]

As shown in the following sections, this cannot provide a valid basis for adopting rules in this proceeding.

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[30](...continued)

> (1) the historical distinction between private and common carrier services; (2) the interest in unambiguously labeling SMR providers as private carriers, and therefore not subject to state entry and rate regulation; and (3) competitive concerns, such as the public interest in ensuring that SMRs are available as a business opportunity for small entrepreneurs and the desire to prevent discriminatory interconnection practices by wirelines.

7 FCC Rcd. at 4398.

[31] *See* 7 FCC Rcd. at 4398-99 & nn.4-9. The Commission's first hypothetical basis for the restriction (*see* note 30, *supra*) lost all force just one year later, when the Commission eliminated the 1974 wireline-only rule for cellular. The second reason postulated for the restriction expired two years later. The Commission may have intended to bolster its classification of the SMR as non-common-carriers by excluding telephone companies. However, this fact played no role in the D.C. Circuit's 1976 decision affirming the decision to license SMRs as non-common-carriers. *See NARUC v. FCC*, 525 F.2d 630, 646-47 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976); *see also* 47 U.S.C. § 332(c). The third hypothetical reason for the restriction became moot by 1982, when the Commission eliminated a restriction that limited mobile equipment manufacturers to a single SMR license, in order to make the SMR business more competitive. *Part 90 Amended*, PR Docket 79-191, *Second Report and Order*, 90 FCC 2d 1281, 1316-19 (1982). Moreover, SMRs were originally limited to providing dispatch service, so interconnection was unlikely to have been a reason for the rule. In any event, 47 U.S.C. § 332(c), enacted in 1982, provided that an SMR may not offer interconnected service *per se*. Under this statute, an SMR's service may be interconnected only by the end user.

[32] 7 FCC Rcd. at 4399 (footnote omitted). In the *220-222 Mhz* decision, which was issued at the same time, affirming the exclusion of wireline carriers from a new SMR band, the Commission further explained that it was concerned with private land mobile service as a competitive alternative to *cellular* service in particular. *220-222 MHz Private Land Mobile Services*, PR Docket 89-552, *Memorandum Opinion and Order*, 7 FCC Rcd. 4484, 4488 (1992).

1. The Commission Cannot Provide a New *Post Hoc* Rationale for the Rules Almost Twenty Years After Adoption, Without Conducting Notice and Comment Rulemaking

Once the original reasons for a rule cease to exist, the rule becomes invalid: "the vitality of conditions forging the vital link between Commission regulations and the public interest is . . . essential to their continuing operation."[33/] However, instead of eliminating the rules that had become invalid, the Commission provided a new rationale for the rules, eighteen years after their adoption.[34/] The D.C. Circuit has observed, "courts have repeatedly held that *post hoc* rationalizations 'are unacceptable substitutions for a *contemporaneous* basis and purpose statement.'"[35/]

The explanation for a rule cannot "follow the rule long after it has been published."[36/] To supply a new rationale for rules that currently have no lawful basis, the Commission had to conduct a new rulemaking, giving notice of the proposed reasons for the rules and considering the comment on the proposed rules and the tentative rationale.[37/]

33/ *Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979); *see Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992) ("In the rulemaking context, . . . it is settled law that an agency may be forced to reexamine its approach 'if a significant factual predicate of a prior decision . . . has been removed.'") (*quoting WWHT, Inc. v. FCC*, 656 F.2d 807, 819 (D.C. Cir. 1981)).

34/ 7 FCC Rcd. at 4399.

35/ *ASH*, 713 F.2d at 799 (*quoting Rodway*, 514 F.2d at 817; *citing Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-69 (1962); *SEC v. Chenery*, 318 U.S. 80, 87 (1943); *SEC v. Chenery*, 332 U.S. 194, 196-97 (1946); *Tabor v. Joint Board for Enrollment of Actuaries*, 566 F.2d 705, 709-12 (D.C. Cir. 1977); *KIRO, Inc. v. FCC*, 545 F.2d 204, 208 (D.C. Cir. 1976)). The APA's requirement that a statement of basis and purpose be incorporated into the rules adopted is based on the notion that "[t]he basis and purpose statement is inextricably intertwined with the receipt of comments." *Rodway*, 514 F.2d at 817.

36/ *ASH*, 713 F.2d at 799.

37/ *ASH*, 713 F.2d at 799-800. The court warned:

> The agency cannot have its proverbial cake and eat it too. If [the Order] does nothing more than to supply the explanation of basis and purpose absent in [the original decision], then [the Order] is invalid as a *post hoc* rationalization. If, on the other hand, [the Order] is in fact a *new* rule, then it must be promulgated in accordance with the rulemaking procedures demanded by section [553] of the Administrative Procedure Act, including its notice and comment requirements.

(continued...)

Clearly, the Commission did not take this procedural route -- there was no notice[38] and the Commission did not consider comments.[39] Instead of issuing a new notice, it simply issued the *Termination Order* announcing its new-found rationale for preventing wireline SMR ownership.

Accordingly, those rules cannot simply be carried over to Part 88 in this proceeding. Moreover, as discussed in the following section, the rationale expressed in the *Termination Order* is substantively flawed, and cannot form a basis for the rules here.

2. The Rules Are Arbitrary And Capricious Because They Restrict Telephone Companies, Which Are Not Within The Scope of the Rationale for the Rules

The *Termination Order* defines "wireline telephone common carriers" as "landline local exchange telephone service" providers.[40] Inexplicably, however, the rationale expressed in that same decision for prohibiting wireline SMR ownership is to enhance the competitive position of private mobile service providers with respect to common carrier mobile service providers such as cellular carriers.

Thus, the rules restrict the wrong class of companies to serve the purpose stated in the *Termination Order*. The rules simply are not directed at cellular carriers or other common carrier land mobile service providers. Rules restricting landline carriers cannot be sustained on the basis of the need

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[37](...continued)
ASH, 713 F.2d at 800.

[38] The outstanding *Notice of Proposed Rulemaking* in PR docket 86-3 did not serve as sufficient notice of such an action, because retention of the rule was not a "significant alternative" under consideration. The Commission said that "[t]here are no significant alternatives besides those considered in this *Notice of Proposed Rule Making*." *Id.* at 2911. Retention of the rules was not among the options listed.

[39] The Commission did not consider the comments filed in response to the 1986 *Notice of Proposed Rulemaking* because, it found, they were no longer "relevant to a meaningful determination." 7 FCC Rcd. at 4399.

[40] *Termination Order*, 7 FCC Rcd. at 4398 n.2; *220-222 MHz*, 7 FCC Rcd. at 4487 n.36.

to protect private land mobile service from domination by cellular carriers because there is no "rational connection between the facts found and the choice made."[41/]

3. The Rules Are Arbitrary and Capricious Because The Rationale for the Rules, If Valid, Would at Most Support Restricting Cellular Carriers, Who Have Never Been the Subject of the Rule

As discussed above, the new rationale for the rules is to protect the competitive position of private land mobile operators with respect to common carrier land mobile providers, such as cellular carriers. The rules, however, do not place any restrictions on cellular carriers *per se*, and instead affect only wireline telephone common carriers. If the rationale for the rules were valid, it would at most support restricting SMR ownership by cellular carriers. Because it does not restrict cellular SMR ownership, the rules are arbitrary and capricious.

Because the rules address only wireline telephone common carriers, they do not restrict the SMR eligibility of the many "non-wireline" cellular carriers, including the largest cellular carrier in the nation, McCaw Cellular Communications, Inc. These companies are clearly outside the definition of wireline common carrier and are therefore unrestricted as to SMR ownership.

Moreover, the rules do not extend to cellular carriers that are affiliates, subsidiaries, or sister companies of landline exchange telephone companies.[42/] Specifically, the rules do not by their terms apply to cellular carriers that do not themselves provide telephone service. The cellular operations of the seven Bell regional holding companies are required by rule to be conducted by subsidiaries fully separated

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[41/] *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962).

[42/] The wireline SMR ineligibility rules do not specifically address affiliates, subsidiaries, or sister companies, but other private land mobile radio service rules do. *E.g.*, 47 C.F.R. §§ 90.61(a), 90.87(a), 90.103(a)(3); proposed § 88.15(a). Under standard rules of statutory construction, the Commission's expression of intent to cover these related entities in some rules negates any presumption that related entities are covered by rules not specifically so stating. *See* 2A Sutherland Statutory Construction § 47.23 at 216 (1991) ("*expressio unius est exclusio alterius*").

from the provision of landline telephone service.[43] These cellular carriers do not provide landline telephone service and do not, therefore, fall within the ineligible class. A similar organization is typically used, although not required by rule, in the case of independent telephone companies, with a holding company owning both the independent telephone company and one or more cellular subsidiaries.

Thus, in nearly all cases, cellular carriers fall outside the class restricted by the rule.[44] The rules extend only to a very small subset of cellular carriers -- namely, those few cellular licensees who are either landline telephone companies themselves or sham subsidiaries of landline telephone

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[43] *See* 47 C.F.R. § 22.901(b)-(d). The cellular operations of BellSouth (and the other seven Bell regional holding companies) are separated from the provision of local exchange telephone service, as the rule requires. Thus, subsidiaries of BellSouth Enterprises, Inc. ("BSE") provide cellular service, but they are not engaged in the provision of wireline telephone service, and they are not certificated by state regulators to provide landline local exchange telephone service. These cellular subsidiaries are thus not themselves telephone companies. Moreover, BSE is a subsidiary of BellSouth Corporation, a Bell regional holding company, and not of BellSouth Telecommunications, Inc., which is the BellSouth company providing local exchange telephone service. The Bell regional holding companies are not telephone companies or common carriers. *See U S WEST, Inc. v. FCC*, 778 F.2d 23, 26 (D.C. Cir. 1985) (common carrier status cannot be attributed to holding company merely because subsidiary provides common carrier telephone service). Thus, BSE and its subsidiaries are not subsidiaries of entities that are wireline telephone common carriers. Their only connection to landline local exchange telephone service is that both BSE and BST are commonly owned by BellSouth Corporation.

[44] Commission staff members have on occasiton advised parties that the rules may apply to affiliates, subsidiaries, and sister companies of wireline telephone companies. Nevertheless, the plain terms of the rules do not restrict SMR entry by most wireline-related cellular carriers, and the rules may not be revised to expand their coverage herein without notice and comment. *See McElroy Electronics Corp. v. FCC*, 1993 U.S. App. LEXIS 8972 (March 4, 1993); *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551 (1987); *Salzer v. FCC*, 778 F.2d 869, 875 (D.C. Cir. 1985); *Radio Athens, Inc. (WATH) v. FCC*, 401 F.2d 398, 404 (D.C. Cir. 1968); *Bamford v. FCC*, 535 F.2d 78, 82 (D.C. Cir.)("elementary fairness requires clarity of standards sufficient to apprise an applicant of what is expected"), *cert. denied*, 429 U.S. 895 (1976). *See also Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 3-4 (D.C. Cir. 1987) ("The Commission through its regulatory power cannot, in effect, punish a member of the regulated class for reasonably interpreting Commission rules. Otherwise the practice of administrative law would come to resemble 'Russian Roulette.'").

companies.[45] There is no connection between the purpose of the rules and their scope, and accordingly the rules are arbitrary and capricious.[46]

4. The Rationale for the Rules Ignores the Public Interest, Lacks Factual Support, and is Unreasonable

Even if the wireline SMR ineligibility rules were related to the rationale for their existence, that rationale would have to be based on factually supported findings that landline telephone company ownership of SMR licenses would adversely affect the public interest. The Commission has not made such findings or enunciated such a rationale in the *NPRM*, the *Termination Order*, the *220-222 MHz* decision, or elsewhere.

The Commission said its reason for the ineligibility rules was to "preserv[e] an environment favorable to the continued development of private land mobile competitors."[47] In other words, the Commission is providing protection for private land mobile operators in order to foster competition with cellular. No public interest basis for this objective was supplied.[48]

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[45] The Commission has never held that the wireline SMR ineligibility rules apply to separate companies under common ownership with telephone companies. The staff has, however, held that a sham subsidiary of a telephone company is ineligible. *See Consolidated Communications Corp.*, 4 FCC Rcd. 7025 (Priv. Rad. Bur. 1989) (telephone company subsidiary found to be effectively one and the same as its parent and was therefore ineligible for SMR licenses). The holding of this case does not apply to separately managed sister companies, however. The Commission appears to have assumed, without deciding, that the rules apply to affiliates of telephone companies, when granting waivers for the acquisition of SMRs by holding companies with telephone subsidiaries. In *James F. Rill*, 60 Rad. Reg. (P&F) 2d 583, 602 (1986), the Commission granted a waiver to permit Pacific Telesis, Inc.,

This contrasts markedly with the Commission's express finding in its 1986 *Notice of Proposed Rulemaking* that entry of wireline carriers into the SMR field would "provide competition for both small and large SMR licensees. Such competition would increase the benefits and improve service to the public."[49/]

The Commission did not explain this about-face. Moreover, the Commission impermissibly focused on maintaining a particular relationship between competitors, instead of determining the benefits to the public of competition between private land mobile and cellular service providers.[50/]

In addition, the Commission gave no reason for its determination that favoring one competitor over another is warranted, other than conclusory statements. The Commission recited that there had been changes and consolidations in the private land mobile industry, and an increase in the number of SMR licenses and in the "capital [sic] generated by SMR service providers."[51/] It did not cite any supporting evidence for these findings, other than citing an internal staff report to support the assertion that the number of SMR licensees had declined as the number of licenses had grown.[52/]

Finally, the Commission did not explain how its findings, if valid, supported protection of the SMR industry, even assuming that to be a proper objective. In fact, the maturation and growth of the SMR industry would appear to support *lessening* the SMR industry's protection from new entry, new capital, and new expertise. Accordingly, the Commission has not stated a lawful basis for adopting rules rendering wireline telephone common carriers ineligible to own controlling interests in SMR licenses.

[49/](...continued)
Commission's rulemaking power is fundamentally based on its authority to codify the public interest. 47 U.S.C. §§ 154(i), 303(r); *see United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203-05 (1956).

[49/] *SMR Eligibility*, PR Docket 86-3, *Notice of Proposed Rulemaking*, 51 Fed. Reg. at 2911.

[50/] *See Hawaiian Telephone*, 498 F.2d at 776.

[51/] 7 FCC Rcd. at 4398-99.

[52/] The report cited by the Commission (Doron Fertig, Policy and Planning Branch, Land Mobile and Microwave Division, "Specialized Mobile Radio" at 23-25 (March 1991), *cited in* 7 FCC Rcd. at 4399 n.11) had not been placed in the docket, had not been noticed for public comment, and did not provide factual support for the Commission's conclusions.

B. The Restraints on Wireline SMR Eligibility Would Deny Telephone Companies Equal Protection Without a Rational Basis

The proposed rules would deny telephone companies equal protection under the law, in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution. A regulatory distinction between similarly situated entities must have a rational relationship to legitimate governmental objectives, or it is unconstitutional.[53]

The proposed rules single out telephone companies as ineligible for SMR licenses, while all other common carriers, including cellular carriers, remain eligible. The Commission has provided no rational basis for this. Because there is no rational basis for this discrimination against wireline telephone companies, adoption of the proposed rules would unconstitutionally deny equal protection to telephone companies.[54]

C. Terminating PR Docket 86-3 Constituted Reversible Error

The *Termination Order*, which summarily concluded PR Docket 86-3 without eliminating the rules (and forms the basis for the proposed rules here), was reversible error. In *Williams Natural Gas Co. v. FERC*[55], the D.C. Circuit found that an agency terminating a rulemaking without action under very similar circumstances to the *Termination Order* acted arbitrarily and capriciously.

As discussed below, this decision requires prompt elimination of the proposed rules here and reconsideration of the *Termination Order*. BellSouth did not oppose the Commission's motion to hold judicial review of the *Termination Order* in abeyance, pending reconsideration in PR Docket 86-3, and the court granted the motion. The Commission has not, however, acted expeditiously to address the

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[53] *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981) ("At the minimum level, this Court consistently has

petitions for reconsideration filed by Bell Atlantic and Southwestern Bell. In light of the precedent established by the *Williams Natural Gas* decision, there should be no need for further delay before the petitions for reconsideration are granted.

The only reason given in the *Termination Order* for summarily concluding the docket was that there had been changes in the SMR industry -- significant growth in the number of SMRs, increases in the "capital generated by SMR service providers," and a trend toward consolidation.[56] The Commission said that because of these changes, "neither the rationale upon which our proposal was predicated nor the comments filed in response to the proposal continue to be relevant to a meaningful determination of whether the wireline limitation should be removed."[57]

Although the *Termination Order* ended the proceeding, the two-page order raised more questions than it answered:

- The Commission did not explain why it had allowed six years to elapse without action.
- The Commission did not adopt the most obvious solution to the passege of time: that is, to update the six-year-old record by calling for supplemental comments.
- The Commission did not explain how the changes in the SMR industry affected the

notice of proposed rulemaking and the comments obsolete;[58] the record had become stale;[59] and the issue would be addressed in other pending and future proceedings.[60]

The court found these arguments unavailing. It held that FERC could not simply terminate a rulemaking that it had begun, without considering the comments and taking them into account in its decision.[61] The court said FERC had tentatively found that the prior rules warranted amendment, and thus those rules could not be left in force without considering the comments and reaching a reasoned conclusion.[62] The FCC's explanation here of the changes in circumstances that supported summary termination of the rulemaking without consideration of the comments is even less persuasive than FERC's explanation.[63] Moreover, the FCC found, in the 1986 *Notice of Proposed Rulemaking*, that the restrictions were "unnecessary" and the rules "should be amended" in order to "enchanc[e] competition."[64] There was nothing tentative about this finding.

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[58] The agency in *Williams Natural Gas* said that it was terminating the rulemaking "because the actions

More specifically, FERC attempted to justify terminating its rulemaking because of a stale record -- four years had passed from issuance of the notice of proposed rulemaking to the adoption of a decision, and a further year passed while that decision was reconsidered. The court was not sympathetic:

> FERC now contends that the long delay is itself a reason for abandoning the inquiry. We do not believe that the agency's decision can be upheld on this basis. If FERC regarded the information in its record as out-of-date, then it might more reasonably have chosen to supplement the record than to terminate the docket.[65/]

Similarly, the FCC may not in PR Docket 86-3 delay six or more years before reaching a final decision and claim that the passage of time has rendered the docket stale. If the comments in PR Docket 86-3 became outdated by changes in the industry, the Commission should have called for further comments. It may not terminate the docket simply because of its own delay in acting.

FERC's argument that termination was appropriate because the issue was being addressed in other pending or future rulemakings was also unavailing. The court noted that the other pending proceedings referred to by FERC could not "undo[] the effects" of the existing regulations -- they would not achieve the purpose of the terminated docket.[66/] The court found FERC's suggestion of dealing with the issue in some future proceeding unpersuasive:

> If the Commission's action is not otherwise sustainable, it cannot be upheld on the basis of a suggestion that the issue *might* be addressed at some indeterminate point in the future. It is by no means clear, moreover, that the initiation of a new rulemaking would be equivalent to the reopening of the old docket. . . . Changes implemented by a new rulemaking might provide far less substantial relief.[67/]

This is dispositive of the FCC's claim in the *Termination Order* that the Commission will further "evaluate" the competitive relationship between common carrier and private land mobile service providers in some unspecified way.[68/] In the *NPRM*, the Commission said it would "leave the issue [of wireline

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[65/] 872 F.2d at 449.

[66/] 872 F.2d at 449.

[67/] 872 F.2d at 450.

[68/] *Termination Order*, 7 FCC Rcd. at 4399.

SMR ineligibility] . . . to a future proceeding."[69] However, the possibility of a future proceeding does not relieve the Commission's responsibility for properly concluding PR Docket 86-3.

The six years the Commission needed to consider its action in PR Docket 86-3, and the further time required for action on the petitions for reconsideration of the *Termination Order*, have effects that cannot properly be addressed in some future proceeding. The Commission's delay in PR Docket 86-3 has excluded wireline telephone common carriers from SMR ownership for years, at the same time as the Commission has greatly expanded the range of opportunities from which wireline carriers are excluded.[70] A future proceeding might not be completed for several more years, during which time wireline telephone common carriers would continue to be excluded from the SMR field. Accordingly, as in *Williams Natural Gas*, a further rulemaking would not "be equivalent to the reopening of the old docket. . . . Changes implemented by the new rulemaking might provide far less substantial relief"[71] than concluding PR Docket 86-3 promptly and eliminating the current restrictions.

Simply put, the *Williams Natural Gas* case makes clear that the summary termination of PR Docket 86-3 constitutes reversible error.

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[69] *NPRM*, Appendix A, 7 FCC Rcd. at 8121.

[70] Specifically, the Commission swiftly completed numerous rulemakings regarding the SMR industry, while taking six years to draft a two-page order in the wireline eligibility rulemaking. Some examples of the SMR

II. THE COMMISSION MUST RECODIFY ITS INTERCONNECTION RULES CONSISTENT WITH THE COMMUNICATIONS ACT TO AVOID ASYMMETRIC REGULATION

Commissioner Duggan has remarked, "regulatory asymmetry -- treating similar services differently -- smacks of unfairness."[72] The *NPRM* proposes to recodify the Commission's private land mobile interconnection rules. Those rules must comply with the Communications Act. The proposed rules do not and will result in unlawful asymmetric regulation of functionally indistinguishable services.

There is little difference between the services offered by a fully interconnected SMR and a cellular carrier. One Commission official recently said, "[T]he actual differences are slight. Technology has produced a very vigorous and growing marketplace, but it has rendered the old conceptual categories obsolete."[73] Nevertheless, the regulatory consequences differ very substantially for the "conceptual categories" of private and common carriers.[74]

The root of the asymmetrical regulation at present is in the private land mobile interconnection rules being proposed for recodification here. Both the existing[75] and proposed[76] private land mobile

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[72] "Infrastructure: What Is It That We Want?", Remarks of Commissioner Ervin S. Duggan at the Cellular Telecommunications Industry Association, Dallas, Texas, at 6 (March 3, 1993) (*"Duggan Speech"*).

[73] Remarks of Beverly G. Baker, Deputy Chief, Private Radio Bureau, at the International Mobile Communications Expo, Anaheim, California, March 23, 1993, and Cellular Telecommunications Industry Association, Dallas, Texas, March 2, 1993, at 2 (released April 5, 1993).

[74] Section 332(c)(3) of the Communications Act, 47 U.S.C. § 332(c)(3), enacted in 1982, preempts state regulation of rates and entry with respect to private land mobile radio, while Section 2(b), 47 U.S.C. § 152(b), ensures that state regulators have jurisdiction over virtually all aspects of intrastate common carrier land mobile service. Moreover, common carriers providing interstate service are subject to provisions of Title II of the Act that require them to provide service upon reasonable request, 47 U.S.C. § 201(a), charge just and reasonable rates, § 201(b), avoid unjust or unreasonable discrimination, § 202(a), and establish tariffs for their services, § 203. Other provisions of Title II provide for suspension and investigation of tariffs, § 204 prescription of rates, § 205, liability for and recovery of damages, §§ 206, 207, 209, the filing and determination of complaints, § 208, filing of intercarrier contracts, § 211, and numerous other forms of regulation. Private land mobile operators are specifically exempted from such common carrier regulation by 47 U.S.C. § 332(c)(2).

[75] 47 C.F.R. §§ 90.476, 90.477, 90.483. *See Private Mobile Radio Service (800 MHz Interconnection)*, Docket 20846, *Memorandum Opinion and Order*, 53 Rad. Reg. 2d (P&F) 1469 (1983), *recon.*, 56 Rad. Reg. (P&F) 2d 684 (1984), *aff'd mem. sub nom. Telocator Network of America v. FCC*, No. 83-1905 (D.C Cir. May 1, 1985).

interconnection rules permit interconnected SMR systems to function like a common carrier providing IMTS or cellular service.[77]

The Communications Act prescribes different regulatory schemes for private and common carriers. Nevertheless, the Commission must avoid asymmetric regulation, by distinguishing between such carriers in meaningful ways. This can be accomplished through amendment of the interconnection rules.

Congress intended, by enacting Section 332 of the Communications Act, to establish a meaningful distinction between private and common carriers, using interconnection as the dividing line between private and common carriers.[78] This dividing line became blurred when the Commission adopted its

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[76](...continued)

[76] Proposed Rule Section 88.321(c) replaces the existing interconnection rules, which occupy several pages of the Code of Federal Regulations, with the following single paragraph:

> When stations subject to this part are shared, arrangements for interconnection with the PSTN must be made with a duly authorized carrier on a non-profit cost-sharing basis. When the interconnection costs are shared, cost sharing records must be maintained and the costs distributed at least once a year. A report of the cost distribution must be placed in the licensee's station records and made available to participants in the sharing and the Commission upon request.

NPRM, Appendix D, 7 FCC Rcd. at 8201.

[77] Under these rules, both the SMR and the common carrier licensee obtain interconnection facilities from a telephone company, permitting the origination or termination of telephone calls by radio service subscribers. Both the SMR and the common carrier licensee are permitted to provide mobile telephone service to the public at large. Both the SMR and the common carrier licensee are permitted to profit from the service they offer. Both the SMR and the common carrier typically offer a relatively standardized rate plan to their customers.

[78] Section 332 of the Communications Act was enacted in 1982 to "establish[] a clear demarcation between private and common carrier land mobile services." H. Rep. No. 97-765, 97th Cong. 2d Sess. 54, 1982 U.S. Code Cong. & Ad. News 2261, 2298 (May 19, 1982) (*Conference Report*). The statute provided that the service provided by shared private systems, such as SMRs, would be included in the definition of "private land mobile service," and therefore exempt from common carrier regulation, with a critical exception: a shared system, such as an SMR, "shall not be interconnected with a telephone exchange or interexchange service or facility for any purpose, except

interconnection rules.[79] Those rules permit an SMR to provide interconnected service virtually identical to that offered by a cellular carrier, as long as its accounting records attribute no profits to interconnection.[80] The proposed rules would continue this asymmetry.

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[78](...continued)

> entity's service offering.[1] If so, the entity is deemed to be a common carrier. If not, it clarifies that private systems may be interconnected . . . under the tests in subsections 33[2](c)(1)(A) and (B), and the entity providing the base station facility or service is nonetheless providing private land mobile service.
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> [1] *See, e.g., Resale and Shared Use of Common Carrier Services*, 60 FCC 2d 261 (1976), *on recon.* 62 FCC 2d 588 (1977), *aff'd sub nom. American Tel. and Tel. Co. v. FCC*, 572 F.2d 17 (2d Cir. 1978), *cert. denied*, 439 U.S. 875 (1978).

Conference Report at 55, 1982 U.S. Code Cong. & Ad. News at 2299.

[79] In adopting the rules, the Commission declared that interconnection of private land mobile systems was to be "unfettered," and permitted SMR operators and other shared-system operators to act as "ordering agents" to obtain interconnection for their customers, because they "are often in the best position to make these arrangements." 53 Rad. Reg. 2d at 1473, 1474. The Commission acknowledged that the statute provides that interconnection must be "obtained 'directly' from a carrier." It appeared to ignore the word "directly," however, in concluding that the statute was not "intended to prohibit SMRS licensees . . . from making these practical [interconnection] arrangements." *Id.* at 1474.

[80] While the statute had appeared on its face to draw the distinction between private and common carriers on the basis of providing interconnection, the Commission allowed the private carrier to offer interconnection as an "agent" as long as it did not profit from the interconnection and did not therefore resell telephone service. 53 Rad. Reg. 2d at 1474-75. In determining whether the interconnection is resold for profit, the Commission said it would look only to the cost of the telephone service, and not to associated interconnection equipment costs. *Id.* at 1475-76. The Commission did not mention that the legislative history had emphasized that the test of common carriage was "whether or not a particular entity is engaged functionally in the provision of telephone service as part of the entity's service offering." *Conference Report* at 55, 1982 U.S. Code Cong. & Ad. News at 2299.

The Commission expressed its view that "[t]he intent of Congress in drafting this legislation was to clarify that private systems may be interconnected . . . and remain classified as private land mobile service." *Id.* This interpretation of the statute ignored both the statutory directive that shared private systems "shall not be interconnected" other than by the users, 47 U.S.C. § 332(c)(1)(A)-(B), and the *Conference Report*'s explanation that the "functional distinction" between private and common carriers was to be whether the service provider "is engaged functionally in the provision of telephone services or facilities as part of the entity's service offering." *Conference Report* at 55, 1982 U.S. Code Cong. & Ad. News at 2299.

Congress expressed in the statute itself its intention to prohibit an SMR from offering subscribers facilities that are interconnected with the telephone network on a private carrier basis. Nevertheless, the Commission has repeatedly invoked as a talisman the legislative history's reference to the distinction between resale and shared use of private line telephone service: i.e., resale is considered common carriage, while sharing is not. 53 Rad. Reg. 2d at 1474-75; 56 Rad. Reg. 2d at 693; *see also Mobile Radio New England*, 8 FCC Rcd. at 349; *Fleet Call, Inc.*, 6 FCC Rcd. at 1537; *American Teltronix*, 5 FCC Rcd. at 1956. The "resale" test appears nowhere in the statute, however. The legislative history's reference to resale is superfluous, because the language of the statute is clear and succinct – far more so than the resale/sharing distinction discussed in the legislative history.